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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 84

LOUIS H. NETZER,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

HARRY H. PETERSON,
EUGENE A. RERAT,
WILLIAM A. TAUTGES,
FRANK L. BRADY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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LOUIS H. NETZER,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Louis H. Netzer, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered on February 20, 1953.

Opinion Below

The opinion of the Supreme Court of the State of Minnesota is reported in 57 N. W. (2d) 247. The opinion has not as yet been reported in the official state reports.

Jurisdiction

This Court has jurisdiction to review the judgment below under U. S. C. A., Title 28, Ch. 81, Sec. 1257(3) upon the ground that a right of petitioner under the statutes of the

United States was denied below. The judgment below was entered on February 20, 1953.

The decision of the Supreme Court of Minnesota affirming the trial court's decision herein is reviewable under Section 1257(3), *supra*, under the rule of cases such as:

Republic Natural Gas Co. v. *State of Oklahoma*, 334 U. S. 62;

Gospel Army v. *City of Los Angeles*, 331 U. S. 543;

Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69;

Department of Banking v. *Pink*, 317 U. S. 64;

for the reason that it is a final determination of the entire litigation between petitioner and respondent requiring the trial court upon mandate to enter judgment upon the verdict herein as a mere ministerial duty. The effect of the decision of the Supreme Court of Minnesota is a final determination of the litigation which leaves nothing further to be adjudicated or decided and concludes the case and all issues of law and fact therein in favor of respondent and against petitioner.

Under Minnesota Statutes Annotated, Sec. 548.03, it is the clerk's duty to enter judgment on the verdict. In fact, under the statute, a party is entitled to enter judgment where the verdict is against him.

Industrial Loan & Thrift Corp. v. *Benson*, 221 Minn. 70, 21 N. W. 99.

The affirmance of the trial court's decision by the Supreme Court of Minnesota constitutes an unconditional denial of the motion for a new trial which was made below and, operates to sustain the verdict and authorize immediate entry of judgment.

Caughey v. *Smith*, 47 N. Y. 244, 66 C. J. S. New Trial, Sec. 210.

Question Presented

Did the Supreme Court of Minnesota err in affirming a decision of the state trial court holding that the interruption of interstate transportation under a billing by a shipper in one state to a consignee in another of a freight car loaded with cargo, without changing the billing or unloading the cargo, for the purpose of making running repairs to enable the car to proceed on its journey with its cargo under the original billing, withdrew the car from and terminated its use in such transportation within the meaning of the Safety Appliance Act, U. S. C. A., Title 45, Ch. 1, Sec. 11?

Statute Involved

The statute here involved is the Safety Appliance Act, U. S. C. A., Title 45, Ch. 1, Sec. 11, which in part provides:

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in Sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Statement of the Facts

This action was brought by petitioner, as plaintiff below, to recover $125,000.00 for personal injuries sustained by him on December 25, 1948, while he was attempting to release a handbrake on a freight car in the yards of the Northern Pacific Railway Company at Missoula, Montana, as part of the job of repairing the car. He based his right of recovery upon two grounds, viz: (1) Violations of the Federal Employers' Liability Act, U. S. C. A., Ch. 1, Title 45, Sec. 51, *et seq.*, consisting of (a) failure to establish a reasonably safe system or method of work, (b) failure to

provide a sufficient number of competent employees to perform the work with reasonable safety to those engaged in doing it, and (c) failure to adopt and enforce reasonable rules and regulations for the performance of the work so as to avoid exposure of those so engaged to unnecessary and unreasonable risks and hazards; and, (2) Violation of the Federal Safety Appliance Act, U. S. C. A., Ch. 1, Title 45, Sec. 11, consisting of having a brake on the car, which it was necessary for petitioner to release, which was defective, not efficient and did not function properly.

The freight car in question was a Santa Fe freight car loaded with sulphur, which was billed and destined for Trentwood, Washington, and had been hauled by the Chicago, Burlington and Quincy Railroad Company (herein referred to as C. B. & Q.) over its lines to Laurel, Montana, where on December 23, 1948, it was delivered to the Northern Pacific Railway Company, the respondent. Northern Pacific hauled the car in a freight train to Missoula, Montana, arriving there on December 24, 1948, at 7:55 a. m., where it was taken off the train for repairs, and thereafter on December 25, 1948, at 6:15 p. m. approximately 35 hours afterward, Northern Pacific resumed hauling the car to Trentwood, Washington, its destination, according to the billing thereof (R. p. 20, f. 31).

The car was taken out of the train at Missoula to replace some defective wheels thereon. Such a wheel change takes a repair crew about one and one-half hours (R. p. 28, f. 44).

In order to do this work, the car was taken out of the train and set on a "rip" or repair track as the place where the work was to be done. The rip track is kept locked so other cars and engines cannot be moved therein without first notifying those working thereon.

The billing and routing of the car were not changed. The cargo was not unloaded. The end of the loaded car was to be raised up and the old defective wheels were to be pulled

out and new wheels put on the car, and then the end was to be lowered in place to complete the operation. This was actually done (R. pp. 40-41-42, 244-245, ff. 61-62-63, 544-548). If the brake on the car is set, it is necessary to release it in order to enable the repairmen to get the wheels off (R. pp. 66-67-68, 244-245, ff. 101-103, 548-549). If a brake is functioning properly, there is no danger incident to releasing it (R. pp. 77-78, ff. 117-118).

Petitioner's duties were to replace defective wheels and not to repair defective brakes concerning which he knew nothing. Petitioner went upon the car pursuant to orders from his crew foreman to release the brake which was set "terrifically on" (R. pp. 41-42, ff. 62-63). While the petitioner was making his third attempt to release the brake, the wheel on the brake suddenly spun so violently that it threw petitioner off the brake platform to the ground fourteen feet below, causing the injuries for which he sought to recover in this action (R. pp. 45-46, 48-49, ff. 68-69, 73-74). The brake did not operate in the regular and usual manner. It was the first experience of this kind petitioner ever had (R. p. 45, f. 69). The testimony of competent witnesses was to the effect that the brake was not in normal operating condition and that such condition was due to some defect in the brake mechanism (R. pp. 103-104, 107, 112, 113, 223, ff. 228-233, 240, 241, 516). As stated, after the repairs had been completed, the car left Missoula for Trentwood on December 25, 1948 at 6:15 p. m.

The evidence on behalf of petitioner established that, in violation of the usual custom and practice of respondent, it left the car in question on the "rip" track with the brake on very tight instead of off, with blocks to hold the car in place, and of the custom to provide an adequate number of men to do the repair job (R. pp. 41, 114, 137, 193, ff. 62, 63, 244, 389, 472); and also that respondent, pursuant to the usual custom and practice, failed to give petitioner timely

notice and warning that the handbrake was defective, inefficient and inoperative (R. p. 130, f. 379).

In the trial court, petitioner, as plaintiff, requested the court to instruct the jury as a matter of law that respondent violated the Safety Appliance Act upon the ground that said brake was not efficient (R. pp. 308, 309, 310, 312, 313, ff. 643, 644, 645, 646, 648, 649) and, if the foregoing instruction were denied, to submit to the jury as a question of fact whether respondent violated the Safety Appliance Act by having the car in question equipped with a handbrake which was not efficient (R. p. 310, f. 646). As part of such instructions, petitioner requested the trial court to charge that if the court held as a matter of law or if the jury found as a fact that there was a violation of the Safety Appliance Act, petitioner was entitled to recover whatever damages he sustained. The question of negligence under the Federal Employers' Liability Act, aside from those relating to liability under the Safety Appliance Act, were submitted to the jury for its decision.

After verdict for respondent, petitioner moved for a new trial upon the grounds, among others, that the trial court erred in refusing to give petitioner's requested instructions relative to the application of the Safety Appliance Act to the facts of this case (R. pp. 318-320, ff. 658-661).

Error was assigned in the Supreme Court of Minnesota raising the questions whether the Safety Appliance Act applied in this case and whether petitioner was entitled to recover for respondent's violations thereof. The decision of both the Supreme Court of Minnesota and the trial court was adverse to petitioner.

Specifications of Error to Be Urged

1. The trial court erred in refusing to submit to the jury the question whether petitioner was entitled to recover upon

the ground that the car upon which he was required to work was equipped with a defective, inefficient and inoperative handbrake.

2. The Supreme Court of Minnesota erred in affirming the decision of the trial court that petitioner was not entitled to have submitted to the jury the question whether he was entitled to recover under the Safety Appliance Act upon the ground that respondent required petitioner to work upon a car which was equipped with a defective, inefficient and inoperative handbrake.

3. The Supreme Court of Minnesota erred in affirming the decision of the trial court.

Reasons for Granting Writ

1. The Supreme Court of Minnesota by the decision below has decided a question of substance not heretofore determined by this Court.

2. That the Supreme Court of Minnesota has decided such question in a way which is not in accord with the applicable decisions of this Court.

3. That the Supreme Court of Minnesota has decided such question contrary to the overwhelming weight of authority.

4. That the Supreme Court of Minnesota by its decision failed to give due weight to the fact that the replacement of the wheels on the freight car in question was a mere running repair during which the car was kept in actual use and was not withdrawn from interstate transportation.

5. The question to be decided is an important one to men engaged as employees in the railroad business; and, if the decision below should stand, many employees in similar cases would be unjustly deprived of the right to recover.

6. That the decision below deprives petitioner of the right

to recover under the Safety Appliance Act and thereby deprives him of an important right under a federal statute.

Conclusion

The writ of certiorari should be granted not only to accord to petitioner important rights which he has under the federal statutes mentioned, but also to establish a precedent under which others similarly situated may have similar rights accorded to them.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 84

LOUIS H. NETZER,

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NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

Summary of Argument

The car in question was being used in interstate commerce because the interstate movement had not been terminated but had only been interrupted and the repairs were made during the interruption while the car was under interstate billing and while it was loaded with its cargo.

Delk v. *St. L. & S. F. R. Co.*, 220 U. S. 580;
Mpls. St. P. and S. Ste. M. R. v. *Goneau*, 269 U. S. 406;
Great Northern R. Co. v. *Otos*, 239 U. S. 349.
C. M. & St. P. R. Co. v. *Volker*, 129 Fed. 522;
Erie R. Co. v. *Russell*, 2 Cir., 183 Fed. 722;
Hines v. *Logan*, 4 Cir., 269 Fed. 105;
Central R. Co. of N. J. v. *Sharkey*, 2 Cir., 259 Fed. 144;

Southern Pacific R. Co. v. *Industrial Accident Commission,* 19 Cal. (2d) 271;
New Orleans & N. E. R. Co. v. *Jackson,* 140 Miss. 375;
Hunt v. *Armour & Co.,* 345 Mo. 677, 136 S. W. (2d) 312;
Yannish v. *N. Y. Cent. R. Co.,* 245 App. Div. 872, 282 N. Y. S. 129;
Cook v. *Southern R. Co.,* 109 S. Car. 377;
Bolch v. *C. M. & St. P. R. Co.,* 90 Wash. 47.

Argument

Petitioner depended for right of recovery: (1) Upon respondent's negligence consisting of violations of the Federal Employers' Liability Act, U. S. C. A., Ch. 1, Title 45, Sec. 51, et seq., which were (a) failure to establish a reasonably safe system or method of work, (b) failure to provide a sufficient number of competent employees to perform the work with reasonable safety to those engaged in doing it, and (c) failure to adopt and enforce reasonable rules and regulations for the performance of the work so as to avoid exposure of those so engaged to unnecessary and unreasonable risks and hazards; and, (2) Violation of the Federal Safety Appliance Act, U. S. C. A. Ch. 1, Title 45, Sec. 11, consisting of having a brake on the car, which it was necessary for petitioner to release, which was defective, not efficient and did not function properly.

We take it, in view of the facts which have been stated and of the further fact that the trial judge submitted to the jury the question of respondent's negligence and liability to petitioner under the Federal Employers' Liability Act (U. S. C. A., Title 45, Ch. 1, Sec. 51, et seq.), that it may be taken as an established fact in the case that the question of respondent's liability to petitioner under the Federal Employers' Liability Act was a question of fact.

In view of the fact that petitioner claimed that respond-

ent was liable for violation of the Safety Appliance Act by reason of the brake on the car in question being defective, inefficient and inoperative, a statement of the issues with respect to the application of the statute should be made. The statute, so far as here material, provides:

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Respondent's contention in the lower courts was that the car in question was not within the Safety Appliance Act for the reasons that it had been "withdrawn" from interstate transportation, because it was not being "hauled" or "used" on its line at the time petitioner was injured in attempting to release the brake. The courts below further held, in accordance with respondent's contentions, that the car in question had been "withdrawn" from interstate transportation by reason of the fact that it had been placed on the "rip" or repair track for repairs. Petitioner's contention was that the interruption for such repairs was simply an incident of the interstate journey and that the car was both being "hauled" and "used" by reason of the fact that the repair work was made for the purpose of enabling the car to go in interstate commerce and involved only an interruption thereof without changing the interstate billing and without unloading the interstate cargo of the car in question while the repairs were being made. This brings us to the one and only question to be decided in this case.

THE INTERRUPTION OF THE INTERSTATE TRANSPORTATION UNDER A BILLING BY A SHIPPER IN ONE STATE TO A

CONSIGNEE IN ANOTHER OF A FREIGHT CAR LOADED WITH CARGO, WITHOUT CHANGING THE BILLING OR UNLOADING THE CARGO, FOR THE PURPOSE OF MAKING RUNNING REPAIRS TO ENABLE THE CAR TO PROCEED ON ITS JOURNEY UNDER THE ORIGINAL BILLING NEITHER WITHDRAWS THE CAR FROM NOR TERMINATES ITS USE IN SUCH TRANSPORTATION, WITHIN THE MEANING OF THE SAFETY APPLIANCE ACT, U.S.C.A., TITLE 45, CHAPTER 1, SECTION 11.

The Duration of Interstate Transportation

Interstate transportation begins when goods are delivered to a carrier for interstate transportation and ends when the goods are delivered to the consignee. Many decisions of this Court discuss the matter and have settled the rule as we have stated it.

Coe v. *Errol,* 116 U. S. 517

In *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 309-310, this Court said:

> "1. The film contracts were between residents of different states contemplated the leasing by one to the other of a commodity manufactured in one state and transported and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitor here was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the lessees. If the commodity were consigned directly to the lessees, the interstate character of the commerce throughout would not be disputed. Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same state, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the

> commodity. It was merely halted as a convenient stop in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end'. *Illinois Central R. R. Co.* v. *Louisiana R. R. Comm.*, 236 U. S. 157, 163. And see *Western Union Tel. Co.* v. *Foster*, 247 U. S. 105, 113; *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, 349."

A freight car used to transport cargo is in interstate or intrastate commerce according to whether its cargo is in course of transportation in the one or the other.

> *O'Brien* v. *United States R. R. Adm.*, 194 App. Div. 63, 185 N. Y. S. 447.

In the O'Brien case, *supra*, a freight car loaded with freight being hauled in interstate commerce was stopped and placed in storage pending a change of locomotive. The Court said:

> " * * * a car is interstate or intrastate according as its cargo is in course of transportation to points within or without the state * * *."
>
> The "stop was a mere interruption of an interstate journey already begun."

Interruptions of Interstate Transportation

In *Coe* v. *Errol, supra*, this Court settled the rule to be that the interstate movement is regarded as continuing despite temporary interruptions because of the necessities of the journey.

In *Champlain Realty Co.* v. *Town of Brattleboro*, 260 U. S. 366, this Court applied the rule in holding that the movement of the goods for purposes of safety and convenience does not terminate the interstate transportation thereof. In that case, logs were held during high water to insure safety of the journey.

> "The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. *If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken.*"

In determining whether an instrumentality of commerce was used in interstate commerce within the meaning of the Federal Employers' Liability Act (U.S.C.A., Title 45, Section 51, et seq.; id. Section 11) the rule stated in the foregoing cases has been applied. The rule is that a freight car is in interstate commerce from the time that it is loaded with the goods which are to be transported in interstate commerce until the car has been delivered to the consignee with its cargo and that any temporary interruptions of the interstate movement for purposes of convenience or to facilitate it, as for example, to protect the shipment or to repair the car, do not withdraw the shipment from interstate commerce nor terminate the interstate transportation.

In *Mpls. & St. L. R. Co.* v. *Winters,* 242 U. S. 353, the question was whether a locomotive, which had been placed in a roundhouse for repairs but which was not destined for any particular service thereafter, was being used in interstate commerce. Mr. Justice Holmes there pointed out that if the engine was being used in interstate commerce and that the repairs were a mere interruption thereof, the engine was being used in interstate commerce, but not otherwise. The evidence did not show that the engine was then engaged in

an interstate haul and that the repairs were made as an interruption thereof. The Court said:

> "It (the engine) was not interrupted in an interstate haul to be repaired and go on."

In *Industrial Accident Commission* v. *Davis,* 259 U. S. 182, the question was whether an engine which had been placed in a repair shop on December 1, 1918 for a general overhauling was being used in interstate commerce. The overhauling job was completed on February 25, 1919, or 87 days after the work began. The plaintiff was injured on January 31, 1919. There the Court said:

> "We refrain from a review of our cases. They pronounce a test and illustrate it. We are called upon to apply it to the present controversy. The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement,—indeed, are necessary to it; but so are all attached to the railroad company,—official, clerical, or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal act. And there is a difference in the instrumentalities. In some, the tracks, bridges, and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not partake of that char-

acter, according to circumstances; and among the circumstances is the time taken for repairs,—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse,—the interruption of actual use, and the return to it, being of varying lengths of time, or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations,—the relations of a workshop,—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it.

"And it is this separation that gives character to the employment, as we have said, as being in or not in commerce. Such, we think, was the situation of the engine in the present case. It was placed in the shop for general repairs on December 19, 1918. On February 25, 1919, after work upon it, it was given a trial, and it was placed in service on March 4, 1919. The accident occurred on February 1st of that year, the engine at the time being nearly stripped and dismantled. 'It was not interrupted in an interstate haul to be repaired and go on.'"

In many cases this Court has indicated that a freight car loaded with cargo in interstate transportation is being used in interstate transportation while the journey is being interrupted for the purpose of making repairs on the car, without expressly holding that such is the fact.

Delk v. *St. L. & S. F. R. Co.*, 220 U. S. 580;
Mpls., St. P. and S. Ste. M. R. v. *Goneau*, 269 U. S. 406;
Great Northern R. Co. v. *Otos*, 239 U. S. 349.

In the *Delk* case, *supra*, the plaintiff was injured in attempting to couple a freight car loaded with lumber on a side track for repairs to a string of cars used in a switching movement. This Court held that the car was being used in interstate traffic when the plaintiff was injured. In the opinion, it cites with approval the opinions of Judge

Severens and Judge Richards in the Court of Appeals. It quotes Judge Severens as stating:

> "But we are inclined to think otherwise. Its cargo had not reached its destination, and was not then ready for the delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair ship, and the car was being hauled upon the track when the accident occurred."

It quotes Judge Richards as stating:

> "This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler."

In the *Goneau* case, *supra,* the question was whether a car which had to be taken out of train because it had a defective coupler which made it impossible to attach it to the other cars was being used in interstate commerce. This Court said:

> "Under the circumstances indicated it is clear that the use of the defective car had not ended at the time of the accident, although it was then motionless. A defective car is still in use when it has been moved with the train from the main line to a siding, to be cut out and left so that the other cars may proceed on their journey. Chicago G. W. R. Co. v. Schendel, 267 U. S. 287, 291, 69 L. Ed. 614, 617, 45 Sup. Ct. Rep. 303. And so it is while still in a section of the train on the main line, to be coupled up and proceed on its journey as a part of the train."

In the *Otos* case, *supra,* where a freight car loaded with cargo was taken out of a train to be put on a side track for repairs and then to go on to its destination, this Court said:

> "The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from

interstate commerce, but merely subjected to a delay in carrying it to its destination."

In numerous cases both the federal and state courts have held that freight cars hauled as part of interstate trains and temporarily placed on side tracks for repairs or to await further transportation to a point where repairs were to be made were being used in interstate commerce, while the cars were so standing.

C. M. & St. P. R. Co. v. *Volker,* 129 Fed. 522;
Erie R. Co. v. *Russell,* 2 Cir., 183 Fed. 722;
Hines v. *Logan,* 4 Cir., 269 Fed. 105;
Central R. Co. of N. J. v. *Sharkey,* 2 Cir., 259 Fed. 144;
Southern Pacific R. Co. v. *Industrial Accident Commission,* 19 Cal. (2d) 271;
New Orleans & N.E. R. Co. v. *Jackson,* 140 Miss. 375;
Hunt v. *Armour & Co.,* 345 Mo. 677, 136 S.W. (2d) 312;
Yannish v. *N.Y. Cent. R. Co.,* 245 App. Div. 872, 282, N.Y.S. 129;
Cook v. *Southern R. Co.,* 109 S. Car. 377;
Bolch v. *C. M. & St. P. R. Co.,* 90 Wash. 47.

A few illustrations of the application of the rule will suffice. In the *Sharkey* case, *supra,* where a repairman was sent to repair a car on a side track as a rush job so that it could be hauled from Bayonne, New Jersey, to Philadelphia, and the car had to be taken out of the train and wait on a side track so the repairs could be made, the court stated (259 Fed. 148) that a car

> "whose interstate movement is arrested to permit repairs fitting it to reach its destination is not by reason of such delay withdrawn from interstate commerce."

In the *Yannish* case, *supra,* which is on all fours with the instant case, a freight car loaded with wheat was set

out for repairs consisting of changing a journal box, the court said:

> "The original loading and billing of the car was not changed, and the contents remained undisturbed." Held that the car was being used in interstate commerce.

In the *Jackson* case, *supra,* where a car loaded with lumber was set on a side track to make repairs so that it could proceed with the journey, did proceed with the journey after the repairs were made. Plaintiff there was injured by using a defective handhold, a violation of the Safety Appliance Act. The Court said (140 Miss. 375):

> "It is true that, while the car on which appellee was injured was not, at the particular time of the injury, actually moving in commerce, nevertheless the stopping of it under the circumstances in appellant's repair yards at Meridian, in our opinion, was simply a step in interstate commerce. The car came into Meridian loaded. When its bad order was discovered it was switched into appellant's repair yards, with the same load, where it was repaired, without being unloaded, and went out in a few hours on its journey to its destination. It cannot be said with reason that the car had ceased to be a commercial car. The evidence fairly shows that appellant had received the car, not primarily for repairs, but for transportation; that the necessary repairs were made that the car might be carried by appellant to its destination. *The repair of the car was mere incident. The dominating thing was the carrying of the car by appellant over its line of road to New Orleans. We think not only the language of the Safety Appliance Act applies to the facts of this case, but they come within the reason and purpose of the act.* It follows from these views that the trial court did not err in directing a verdict for appellee on the question of liability."

In the *Hunt* case, *supra,* running repairs were made at the Kansas City plant of Armour & Company on refrigerator cars used in hauling goods in interstate commerce. These repairs consisted of installing new couplers, new wheels, fixing roofs, fixing brake beams, and the like. The plaintiff there was injured while making a change of wheels on a refrigerator car on a side track. The job, the same as the one in the instant case, required about an hour and a half. Mr. Justice Hyde, speaking for the Court said:

> "It has been frequently ruled that temporarily diverting a car or engine from its regular use for the purpose of making running repairs does not withdraw it from its interstate use or break the continuity of such use."

In the *Bolch* case, *supra,* a car loaded with lumber under billing from Tacoma, Washington, to Aberdeen, South Dakota was placed on the railroad's side track in its yards in Tacoma for repairs. The repairs were made while the car was so billed and loaded. The court held that the car was being used in interstate commerce and said (90 Wash. 53):

> "If so loaded, that fact fixed its status as an interstate car. The interstate transportation, to which it was then devoted, was not ended merely because the car had become temporarily disabled and was placed upon the repair track where it was waiting its turn for repairs. While so placed and waiting, it was still in interstate commerce."

Engines

The foregoing rules have been applied in numerous cases involving engines.

N. Y. Central R. Co. v. *Marcone,* 281 U. S. 345;
Edwards v. *B. & O. R. Co.,* 7 Cir., 131 Fed. (2d) 366;
Atlantic Coast Line R. Co. v. *Woods,* 4 Cir., 252 Fed. 428;
B. & O. R. Co., v. *Kast,* 6 Cir., 299 F. 419.

In the *Kast* case, *supra,* the engine was held to be used in interstate commerce, because, while it was in the round house for repairs, it was "bulletined" to go out the same day.

In the *Woods* case, *supra,* in holding that the engine there involved was being used in interstate commerce, the court distinguished the *Winters* case and said (252 Fed. 432, 433):

> "The case at bar, as we have stated, is distinguishable from the cases relied upon by counsel for plaintiff, inasmuch as the engine was taken out of interstate commerce for the express purpose that it might be repaired to enable it to continue as an instrument of interstate commerce. In other words, it is easily distinguished from the Winters case because the character of the work in which the engine in this instance was employed did not depend 'upon remote possibilities or upon accidental later events'. It appears from the evidence that Engine 88 was regularly engaged in hauling interstate passenger trains, operating under a rule of the road by which it reached Florence every three days. It further appears that on the day plaintiff was injured this engine was taken out of the Columbia-Wilmington train in order that the U-bolt in question might be repaired. It also appears that the engine was placed in the shop and sent out upon the same day on its regular run, hauling what is known as the Columbia-Wilmington train."

It is not necessary that a car be moving in order to be in interstate transportation.

Brady v. *Terminal R. Assn.*, 303 U. S. 10;
Mpls. St. P. & S. Ste. M. R. Co., v. *Goneau*, 269 U. S. 406, *supra.;*
Johnson v. *Southern Pacific R. Co.*, 196 U.S. 1;
Fort Street Union Depot Co. v. *Hiller*, 119 F. (2d) 307;
Cusson v. *C. P. R. Co.*, 2 Cir., 115 Fed. (2d) 430.

In the *Brady* case, *supra,* this Court held that a car standing on a sidetrack while being inspected was being used in interstate transportation.

In the *Johnson* case, *supra,* dining car standing on a side track prepared for an interstate trip and awaiting to be picked up by an interstate train was held to be in interstate commerce.

In the case of *Fort Street Union Depot Co., supra,* a club car standing on a side track awaiting to be picked up by an interstate train was held to be in interstate commerce. An employee injured by reason of a defective handhold was held to be under the Safety Appliance Act and entitled to recover thereunder.

In the *Cusson* case, *supra,* a Delaware car was standing on a side track coupled to a car which was to be picked up by an interstate train. In separating the cars it became necessary to set the handbrake on the Delaware car in order to prevent it from moving. The plaintiff was injured by reason of the defective brake. Circuit Judge Learned Hand said (115 Fed. 432):

> "Certainly the defendant 'used' the brake upon the Delaware car for its own purposes; that was necessary to prevent the Delaware car's 'drifting' down the track after the Boston and Maine car had been uncoupled. The argument must therefore be that a 'use' of the brake was not a 'use' of the car, which is not only verbally untrue but it disregards the whole underlying purpose of the act."
>
> "The fact that the Delaware car was not in motion does not of course mean that it was not in 'use' (Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Goneau, 269 U. S. 406, 46 S.Ct. 129, 70 L.Ed. 335), but it is arguable whether the only 'use' of it was not the Boston and Maine's which was in possession of it at the time and was to take it to its destination."

So it was here. Plaintiff was injured while using the handbrake on the car in question while the interstate movement was interrupted.

In this connection, it is to be remembered that the statute uses both the words "hauled" and "used". In *U. S.* v. *St.*

Louis-Southwestern Ry. Co. of Texas, 4 Cir., 184 Fed. 28, the Court of Appeals pointed out this difference in the following language:

> "The penalty is imposed by Section 6 when the car is 'hauled or used'. Is the defendant's contention true, that a hauling is absolutely necessary to complete the offense? The statute forbids hauling and using. Why were both words used? If the car was fully loaded and on the track ready to be started as a part of an interstate train, with engine attached and fired, and requiring only the touch of the engineer to start, would not the car be 'used' or in use, within the statute before it was hauled? If it was without the automatic coupler, so that the brakeman would have to go between the cars to couple them, it would clearly be within the mischief the statute was intended to prevent. 'Used' has other meanings than 'hauled.' It is a broader word. To haul is to use, but may not a car be used within the statutory meaning otherwise than by being hauled? This question is not necessarily involved so as to require its decision, and is only relevant as bearing on the soundness of the defendant's contention, for in the instant case all three of the defective cars were, in fact, hauled."

So here, not only as a matter of well established principle, but according to the Safety Appliance Act itself, it is clear that there may be use which does not involve movement. Holding the car under its interstate billing and keeping its cargo on the car during the repairs constituted "use", as well as "hauling".

The Errors in the Decision Below

The fundamental error in the decision below is that it failed to recognize that the car in question remained in interstate commerce from the time it was picked up by the C. B. & Q. R. Co. until it was delivered to the consignee in Trentwood, Washington, and that the interruption of

the journey at Missoula for the purpose of replacing the defective wheels was but a mere incident in such transportation, made for the purpose of enabling such transportation to continue. The court also failed to recognize the fact that during the time the interstate movement was so interrupted, the car remained under its original billing and its cargo was unloaded. While the car was not moving, it still contained its cargo and that in itself constituted a separate and subordinate use thereof in interstate transportation. Interruption of the movement of the car in question for such repairs was no different than that of an autoist stopping at a filling station to have a wheel or tire repaired.

It is respectfully submitted that the Minnesota court misconstrued the decision of this Court of *Delk* v. *St. L. & S. F. R. Co.*, 220 U. S. 580, *supra*. The cases of *Lyle* v. *Atchison T. & S. F. R. Co.*, 177 F. 2d 221; *B. & O. R. Co.* v. *Hooven*, 297 F. 919 and *Compten* v. *So. Pac. Co.*, 70 Cal. Ap. 2d 267, cited below, are different for the reason that they involved locomotives which were not under billing or assignment to any particular service after the repairs to be made on them had been completed. The case of *Sherry* v. *B. & O. R. Co.*, 32 F. 2d 487, is not in point because that involved an empty freight car which had been withdrawn from service and had not been kept in service as the one here was. In *N. Y. C. & St. L. R. Co.* v. *Kelly*, 70 F. 2d 548, it appeared that the car was on a side track for repairs of safety appliances and that the plaintiff was injured by reason thereof. The car in question was empty and not loaded, was not under any definite billing and so far as the record was concerned was not destined to return to any particular interstate transportation. The case of *Kaminski* v. *C. M. St. P. & P. R. Co.*, 180 Minn. 519, is not in point for the reason that that involved repairs of a freight car in a repair yard. The repairs there consisted of entirely dismantling

the car and practically rebuilding it. The car itself was not destined for any particular service after the repair job was completed. Here, unlike the *Kaminski* case, the car was kept in service during the repairs under the original billing and loading.

Conclusion

The refusal of the trial court to submit to the jury plaintiff's alleged right to recover under the Safety Appliance Act, and the decision of the Supreme Court of Minnesota affirming the trial court's determinations, denied to plaintiff a substantial federal right. Under the numerous decisions which we have cited above, plaintiff made out a case for the jury and was entitled to have the issue passed on by the jury.

This Court further held in numerous similar cases.

Myers v. *Reading Co.*, 331 U. S. 477;

O'Donnell v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U. S. 334;

Wilkerson v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497, and other similar cases.

It is clear that the decision below of the Supreme Court of Minnesota and the authorities which it cites as in support of its views are unsound in principle and opposed to the overwhelming weight of authority. In affirming the decision of the trial court, the Supreme Court of Minnesota erred for the same reasons. Therefore, your petitioner is entitled to a new trial in order that his federal rights under the Safety Appliance Act may be accorded to him.

Respectfully submitted,

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